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United States Supreme Court

OCTOBER TERM, 1944.

No. 1029

MARYLAND CASUALTY COMPANY,
Petitioner,

vs.

COUNTY OF ALLEGHENY, a Political Subdivision of the Commonwealth of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MARYLAND CASUALTY COMPANY,
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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Maryland Casualty Company, by its counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the case entitled, "County of Allegheny, a political subdivision of the Commonwealth of Pennsylvania, Plaintiff and Appellant, *v.* Maryland Casualty Company, a Maryland Corporation, Defendant, Appellee," reversing the decision by the United States District Court for the Western District of Pennsylvania.

Opinion Below.

The opinion of the United States District Court for the Western District of Pennsylvania (R. 2154) is reported in 42 Fed. Supp. 672. The opinion of the Circuit Court of

Appeals for the Third Circuit was filed December 22, 1944 (R.) and is not yet reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; 28 U. S. C. A. Section 347 (a).

Questions Presented and Reasons for the Writ.

(1) Whether the Circuit Court of Appeals in this case has decided an important question of local Pennsylvania law in conflict with applicable Pennsylvania decisions in that

(a) the Circuit Court of Appeals construed and applied the Pennsylvania Equity Rule 66 to the facts of this case in conflict with decisions of the Supreme Court of Pennsylvania:

(b) it applied Section 69(2) of the *Restatement, Judgments* by the American Law Institute as the law of Pennsylvania applicable to the facts of this case, and contrary to and in conflict with the decisions of the Supreme Court of Pennsylvania.

(2) Whether the Circuit Court of Appeals in this case has decided an important question of local Pennsylvania law in conflict with the applicable Pennsylvania statute (Section 49 of the Sales Act of Pennsylvania, 69 P. S., Sec. 259) and applicable Pennsylvania decisions thereunder, in that its determination holds that a seller need not comply with the statute by giving notice of breach where the giving of such notice would be a "vain act", *i.e.*, where the buyer has been adjudicated a bankrupt.

Rules and Statutes Involved.

Pennsylvania Equity Rule 66 (adopted by the Supreme Court of Pennsylvania, May 30, 1924) reads as follows:

> "If the judge or referee, upon the close of plaintiff's evidence, shall be of opinion that the case made in the bill has not been sustained, he shall have power, without hearing evidence on behalf of defendant, to enter a decree of dismissal which shall have the effect of a nonsuit at law. If exceptions are filed to such a decree, and the court or referee refuses to change it, it shall become a final decree for all purposes, and subject to appeal exactly as if it had been entered after a hearing of both parties."

Section 69(2) of the *Restatement, Judgments* by the American Law Institute reads as follows:

> "(2) Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."

Section 49 of the Pennsylvania Sales Act (69 P. S. Sec. 259) provides in part:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty, within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."

Statement.

This action by the County of Allegheny, a political subdivision of the Commonwealth of Pennsylvania, against Maryland Casualty Company, was predicated upon a bond issued by the latter on March 26, 1931, and was tried before a jury in the Western District of Pennsylvania, and resulted in a general verdict and judgment (R. 1806) for the County in the sum of $251,266.67, representing the full principal amount of the bond, with interest. Thereafter, on motion of Maryland Casualty Company, Petitioner herein, the Trial Judge, Gibson, D. J., vacated the County's verdict and entered judgment for Maryland Casualty and also granted a new trial (R. 2153). The County thereupon appealed to the Circuit Court of Appeals, and the appeal was dismissed upon the ground that the grant of a new trial, not having been expressly conditioned to be effective upon reversal of the judgment, had automatically vacated the judgment. A Petition for Writ of Certiorari to the Supreme Court of the United States was then filed by the County, October Term, 1942, No. 774. The Petition was denied, April 12, 1943, 318 U. S. 787. Upon remand, the District Court entered a new judgment n.o.v. for Maryland Casualty and granted a new trial conditionally as an alternative or in *succedaneum* (R. 2188). An appeal was then taken by the County to the Circuit Court from the judgment n.o.v. so entered (R. 2193). The Circuit Court, after hearing the argument, reversed the judgment n.o.v. entered by the District Court, and filed an opinion December 22, 1944 (R.). From the judgment of the Circuit Court, this Petition is filed.

The action was originally instituted in the State Court in April, 1937, and was then removed to the United States

District Court for the Western District of Pennsylvania. In July, 1939, the County filed an amended complaint (R. 3), to which an answer was filed by Maryland Casualty (R. 62), and a reply filed by the County (R. 79).

The bond on which the action is based, was conditioned upon the faithful performance of the contract which the County had awarded to Poole Engineering & Machine Company (herein referred to as "Poole") for the delivery of 1100 American voting machines, to be in accordance with specifications attached to the contract. All the 1100 voting machines were delivered by Poole to the County by October, 1931, and admittedly "performed with general satisfaction" in the primary and general elections of 1931. In January, 1932, Poole was adjudicated a bankrupt. In June and December, 1932, the County gave written notice to Poole's trustee in bankruptcy of certain minor alleged defects in the machines. Claiming fundamental defects in the machines and without prior demand on Poole's trustee or on Maryland Casualty, Petitioner herein, the County expended in excess of $800,000 to redesign and reconstruct the machines. Approximately $126,000 is claimed to have been expended in 1933, and approximately $700,000 in 1934 and 1935. To recover the amount covered by the bond of Maryland Casualty, the County instituted the present action.

As a third separate defense (R. 64), Maryland Casualty pleaded a prior action, *Bassett, et al.* v. *Armstrong, et al.*, 309 Pa. 296, 163 Atl. 525 (hereinafter called the "*Bassett* case"), as *res judicata* of all matters in the County's amended complaint. Said defense was proven at the trial by the introduction into evidence of Defendant's Exhibits D-41-a to D-41-z (R. 1917-2100, inc.), being the entire record in the Court of Common Pleas of Allegheny County, Commonwealth of Pennsylvania, of an action instituted in

October, 1931, wherein Ada V. Bassett, a taxpayer, together with some intervening taxpayers were plaintiffs, and Poole and the County Commissioners, County Controller and County Treasurer of Allegheny County were co-defendants. The complaint in the *Bassett* case was a taxpayers' bill (concerning itself with the same 1100 voting machines described above and involved in this case), and prayed that the County and its officers be enjoined from (a) paying to Poole any sums unpaid on the machines delivered; (b) receiving any further machines under the contract with Poole, and (c) that the County Commissioners be required to take action against Poole for breach of its contract with the County and that they proceed on the bond of Maryland Casualty (R. 1931-1933). The Bassett complaint alleged (R. 1924, 1925) various defects in the machines, being of the same type, extent and nature as the alleged defects in the complaint in the instant suit (Schedule of Breaches annexed to the instant complaint, R. 26-44, inc.). The County appeared in the *Bassett* case (R. 1943, 1945), and by answer of its County Commissioners (Defendant's Exhibit D-41-k; R. 1954-1961, inc.), stated specifically (R. 1955) that the machines functioned satisfactorily at the 1931 primary and general elections, and denied (R. 1955, 1956) the alleged defects in the machines, taking up each of the alleged defects set forth in the complaint and specifically contradicting it. The County prayed that the bill be dismissed (R. 1960).

The *Bassett* case was tried from December 18, 1931 to December 22, 1931 before the Chancellor, and the entire testimony and proceedings are in evidence as Defendant's Exhibit D-41-bb (R. 1971-2077, inc.). The County Solicitor was present and participated in the trial. At the end of plaintiff's case, defendant Poole moved to dismiss. On

December 29, 1931, the Chancellor filed his opinion and order (Defendant's Exhibit D-41-s, R. 2078-2082, inc.), which dismissed the complainant's bill. In the course of his opinion, the Chancellor stated (R. 2081):

> "In the light of the manner in which one machine functioned and the efficiency of the other, except for the judicial offices referred to, it appears to the Chancellor, and we so find, that there is no inherent defect in the machine. Wide latitude was granted plaintiffs in bringing the machines into Court and submitting them to tests which as nearly as may be, duplicated conditions of a polling place. Careful review of the proceeding fails to disclose evidence of the inherent defects of the machines. * * *
>
> "On Plaintiffs' testimony, we would be compelled to find, we think, as a fact that the machines are efficient for their intended purpose and that they conform to the requirements of the contract and specifications and the law existing at the time the contract was made; and so finding, would be required to conclude as a matter of law that the county must pay the balance due."

On January 5, 1932, Bassett filed exceptions, (R. 2084-2092, inc.) to the decree of dismissal, to the Court en banc in accordance with the provisions of Pennsylvania Equity Rule 66. Those exceptions were overruled after hearing. An order dismissing the bill was affirmed (R. 2094). The Court en banc, in its opinion, states (R. 2093, 2094):

> "A subsequent adjournment was taken to December 28th, 1931. Meanwhile, upon petition of Poole Engineering & Machine Company, a writ of peremptory mandamus was granted, directing the County Commissioners to pay to the petitioner in that case the balance claimed to be due on the voting machines. Pursuant to the writ, an order for payment was made and the whole amount has been paid.

> "It at once appears from a scrutiny of the pleadings and the evidence that the issue raised has become a moot question, and argument or discussion thereof purely academic. * * *
>
> "The exceptions, in our opinion, must be dismissed, and we therefore affirm the Order made on December 29th, 1931, dismissing the bill, upon the opinion filed by the Chancellor, and direct the entry of said Order as a final decree."

From the order of the Court en banc, Bassett appealed (again pursuant to Equity Rule 66) to the Supreme Court of Pennsylvania (Defendant's Exhibit D-42-a; R. 2100), and the County filed notice of appearance in the Supreme Court (R. 2115). New County Commissioners having come into office, they were substituted in the place of the original named Commissioners (Defendant's Exhibit D-42-i; R. 2119-2122, inc.). The County filed a brief in the appeal proceedings (Defendant's Exhibit D-43-b; R. 2135-2136), contending for the first time that its previous position had been a mistaken one, concluding that the machines were defective, and asking that the Court reverse the decree of dismissal and remit the case for trial, that a "decree in the nature of a Decree of Restitution" may be entered. The Supreme Court, in an opinion filed (R. 2131) 309 Pa. 296, affirmed the decree of the court below and dismissed the appeal, stating, in its opinion (R. 2132):

> "The chancellor found as a fact, upon a consideration of plaintiff's testimony only, 'that the machines are efficient for their intended purpose and that they conform to the requirements of the contract and specifications and the law existing at the time the contract was made; and so finding, we would be required to conclude as a matter of law that the county must pay the balance due' on the contract. He, therefore, reported in favor of dismissing the bill."

The Circuit Court of Appeals made no mention in its opinion of an all-important proposition of law presented by your Petitioner and argued, to wit, that the County is precluded from recovery in this action because it did not comply with the requirements of notice contained in Section 49 of Pennsylvania Sales Act (69 P. S. Sec. 259). In its Petition for Rehearing filed before the Circuit Court, Maryland Casualty asked for a consideration of the question of law concerning notice because if it should be determined in favor of Maryland Casualty, it would require the Court to sustain the judgment below. The Petition for Rehearing was denied on February 8, 1945. Accordingly, Maryland Casualty considers the question as having been determined against it by the Circuit Court and requests certiorari from this Court so that the point may be considered.

The point is that in its charge to the jury, the Trial Court said (R. 1790-1791):

> "It appears from the testimony, and is not denied by plaintiff, that a large number of breaches of contract as claimed by plaintiff were not called to the attention of the Poole Company or defendant. * * * If the giving of notice of defects discovered after bankruptcy would be a vain act, then plaintiff was not required to give such notice to it. The question is whether or not it was, under the circumstances, a vain act."

This was, in our opinion, an erroneous statement of law by the Trial Court. There is no fact issue involved in this point. The only notice given to Maryland Casualty or to Poole, for whom it was surety, was a notice of June 16, 1932 of some six unimportant matters (R. 73-74; 1842), and a notice of December 13, 1932 (R. 75-77; 1851) which was almost eighteen months after the earliest delivery of the machines and more than a year after their use in the elec-

tions. We contend that such notices were not timely within the Pennsylvania decisions.

We argued the point in support of the judgment, appealed from in our favor, under the doctrine well established in *United States and Interstate Commerce Commission* v. *American Railway Express Company*, 265 U. S. 425 and *Story Parchment Company* v. *Paterson Parchment Paper Company*, 282 U. S. 555.

WHEREFOR your Petitioner respectfully prays that a Writ of Certiorari be issued out of this Court directed to the Circuit Court of Appeals for the Third Circuit, to the end that this case may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals may be reviewed and reversed; and that your Petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and just, and thus your Petitioner will ever pray.

MARYLAND CASUALTY COMPANY,

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New York, N. Y.,
Counsel for Petitioner.

~~Because of present manpower shortages and illness, we have been unable to complete a brief in support of this Petition at the time of the filing of the Petition, but will file a brief in support thereof as expeditiously as possible.~~

I certify that in my opinion the foregoing Petition is well founded in point of law. It is not filed for delay.